No. 3124

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellant,

vs.

TAM SEN,

Appellee.

REPLY BRIEF FOR APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

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Filed this.....day of June, 1918.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE FREEMAN PRINT SHOP

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Statement of the Case.

A question arises at the threshold of this case as to whether or not the order allowing the appeal, which is the basis of this proceeding, is sufficient to enable the Court to examine into the points which would otherwise be involved in the case. The order follows:

"Order Allowing Appeal.

"On motion of John W. Preston, United States Attorney, and Casper A. Ornbaum, Assistant United States Attorney, attorneys for appellant in the above-entitled cause.

"IT IS HEREBY ORDERED, that an appeal to the

> United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.
>
> "Dated, this 27th day of December, 1917.
>
> "Wm. H. Hunt
>
> *"Judge of the District Court."*

It will be observed that this order allowing the appeal does not designate from what order or what judgment the appeal is. It is not identified as having been made on a certain date, nor is it identified by what the purport of the order may have been. An examination of the record, pages 12 and 13, discloses that on that date the lower court made an order, the important part of which is as follows [page 13], to wit:

> "After hearing said attorneys, further ordered that said demurrer be, and the same is hereby overruled and that a writ of habeas corpus issue, as prayed, returnable June 29th, 1917, at 10 o'clock a. m."

Whereas, upon page 49 of the record is disclosed an order made upon the 29th day of June, holding

> "that the detained was illegally restrained of his liberty as alleged in the petition, and that he be and he is hereby discharged from custody from which he has been produced and that he go hence without day."

It is shown that the order allowing an appeal in this case does not refer to either the notice of appeal or peti-

tion for appeal or the assignment of errors. It stands alone without designating which of the two orders or judgments the appeal was to be allowed from.

Tam Sen is a native-born citizen of the United States of America. His status as such was the subject of judicial determination before the United States District Court for the Northern District of California in the habeas corpus proceeding entitled in his name and numbered 6411. This adjudication was made December 17, 1888. Tam Sen arrived at the port of San Francisco on the steamship "Costa Rica" February 15th, 1917, and sought to re-enter the United States as a native-born citizen thereof. He did not base his right of entry upon any supposed exemption or privilege contained in the Chinese Exclusion Laws. All citizens of the United States other than Tam Sen, who arrived on the steamship "Costa Rica" were landed after an inspection under the General Immigration Law. Tam Sen was examined under the Immigration Law and found admissible, and then instead of being landed, was passed along and examined under the Chinese Exclusion Laws [Page 7, Appellant's brief]. It is contended that this was illegal procedure. The Constitution of the United States which guarantees equal protection of the law would not sanction a procedure which permits all citizens of American birth, other than Chinese, to have their citizenship determined under the more friendly General Immigration Act and say to the American citizen of Chinese birth that you alone may not have your citizenship determined under the more friendly General Immigration Law, but must

have your citizenship determined under the more rigorous procedure of the Chinese exclusion and restriction acts.

At the hearing before the Commissioner of Immigration under the Chinese Exclusion and Restriction Acts it is contended there was no real question involved as to the identity of Tam Sen with the person described in the court record No. 6411. Identity was conclusively established by identity with name; by identity of handwriting, comparing the three exemplars of Tam Sen's hand writing made in 1888, two of which are contained in the court record 6411 and one in Chinese Bureau record which preceded the court proceeding, with exemplars of his hand writing made when he was an applicant for admission in 1917; together with a knowledge upon Tam Sen's part of all of the corroborating facts contained in the habeas corpus proceedings 6411; together with a facial likeness to the tin type photograph in the habeas corpus record 6411, which, notwithstanding the passage of twenty-nine years, was so similar as to cause some of the immigration officers to express the opinion that it was Tam Sen, and even caused the Assistant District Attorney now prosecuting this appeal, to make the following statement upon the hearing of this case before the lower court, after Mr. Mayer, the law officer connected in the office of the Commissioner of Immigration, who is the respondent in this case, had testified as follows, on pages 32 and 33 of the record:

> "Q. Do you think, Mr. Mayer, that this is the same man who received his discharge in this court?

"A. If I were called upon to decide whether or not he was, I would—

"MR. MCGOWAN: That is for the Court to say.

"THE COURT: Well, I would like to hear his opinion anyway.

"MR. MAYER: While I am not absolutely satisfied that he is the same man, I would consider him so—as being the same man rather than not being the same man.

"MR. ORNBAUM: If your Honor please, under these circumstances I do not think that the Government would be justified in going any further into this case. I take the position that where such a valuable right of any person is at stake, and there is such a strong resemblance as in this case, I don't believe that, under the circumstances, the Government is really justified in pressing the case any further.

THE COURT: I don't want to put the burden of this upon you, Mr. Ornbaum, I am willing to assume it myself."

Upon Tam Sen's case being brought into the lower Court upon the present habeas corpus proceedings it was contended the lower Court still had jurisdiction to determine to whom its record applied. The hearing before the Court amply demonstrated one essential reason for this fact. It was shown that from the original record of the Court, that is, the original tin type photograph of Tam Sen, that there were physical marks and scars discernible upon the original tin type which were not observable upon the photographic copies thereof. An examination of the original tin type under a microscope, and a comparison of the petitioner, Tam Sen, with the original tin type, showed that Tam Sen had the scars or marks of identification so discernible on the tin type when examined under the

microscope. This is further shown from an extract of the testimony of Inspector L. Lorenzen, Record 35-36:

> "Q. Do you desire to make any further comparison between the picture and the applicant who is before the Court this morning?
>
> "A. I would like to say this, that I did not notice the scars that have been referred to here in court; I would like, if it is agreeable to the Court, to see if I see such scars, which might affect my impression.
>
> "THE COURT: Yes.
>
> "THE WITNESS [after examination]: I would state that I find what I believe are scars or pitmarks on the photographs in almost the identical position as the scars, or rather pitmarks on applicant's face; and this naturally would be a point in favor of applicant's contention."

The only circumstance against Tam Sen before the Immigration Service is the fact that certain officers of their service in comparing Tam Sen with the photographic copy of the tin type picture, found certain points which they contended were shown by the photographic reproduction of the tin type and were not shown in a personal comparison with Tam Sen. The vice of these comparisons is that they are at best but the opinions of the persons who uttered them, and the opinions are based upon photographic copy of a tin type picture with the original thereof after the lapse of 29 years. In the tin type picture the subject's head is tilted back so that his long nose appears short. His face was covered with lights and shadows to such an extent that many of his true features were obscured, and his face was held at such an angle that it could not be told whether the lobe of his ear was connected

at the end thereof with his cheek or not. The main point against Tam Sen in their comparisons was the question of the ear in the tin type picture, as it was there made to appear. The point is best illustrated by directing attention to the testimony of identification expert of the Police Department of San Francisco, Adolph Jewell, qouting from the record, pages 39 and 40:

> "Q. I will ask you to compare his ears, the ears of the photograph, with the ears of the individual here?
>
> "A. The ears of this man are attached to the face, the lobes. There are no lobes at all; whereas this photograph shows distinctly, that the man has lobes as you can judge.
>
> "Q. Wouldn't it be possible for the side of the face to be shaded to such an extent that you would not be able to tell?
>
> "A. That is difficult for me to answer; I know nothing about photography."

CROSS EXAMINATION

> "MR. MCGOWAN: Q. Your opinion is merely based—
>
> "A. On the formation of the ear.
>
> "Q. What you believe to be the formation of the ear from what is shown on the photograph?
>
> "A. That is the idea.
>
> "Q. You are not prepared to say from the photograph, shown here, whether it is connected to the head or not? A. No."

Quoting also from the testimony of Inspector Lorenzen on page 37:

> "Q. You would not be prepared to say that this detained before the Court is not the subject of this picture?

"A. I would not want to swear he is not."

And again from the testimony of Inspector Pierce, on page 44 of the record:

> "Q. Don't you think there would be material changes in the formation of a person's face after a lapse of 30 years between the taking of such pictures?
>
> "A. Most assuredly there would.
>
> "Q. Do you know anything at all about photography or taking tintype photographs?
>
> "A. I don't know as I know just what you mean.
>
> "Q. The way features are shown up through the medium of the tintype?
>
> "A. I have some knowledge.
>
> "Q. During what period of the time have you had knowledge concerning the reproduction of the features by means of a picture, to make a study of it?
>
> "A. I have never made a study of it, no sir."

As a matter of positively identifying this respondent, the former applicant for admission, with the Tam Sen of the habeas corpus proceedings in 1888, I have heretofore mentioned the three old exemplars of his handwriting. Upon this point attention is directed to page 24 of the record, which is as follows:

> "Mr. McGowan: At this time, if your Honor please, we desire to introduce in evidence, by consent, the record of the Immigration expert upon the handwriting submitted in this case, which is as follows: It is addressed to the Commissioner of Immigration
>
> " 'In re: No. 15928/1-1 Tom Sen, Native, C. B. ex ss "Costa Rica"; Feb. 15, 1917.
>
> " 'In accordance with instructions of the acting inspector in charge, Chinese Division, I today compared the signature of Tom Sen on landing record

June 17, 1888, No. 9237, S. S. "Oceanic" with that written by him today both by brush and pencil, and I am of the opinion that all signatures are those of the same person.' It is dated March 30, 1917; and signed Young Kay."

Tam Sen is thoroughly Americanized in appearance, dress, manner, custom, and also speaks our language quite thoroughly. An examination of the record before the Immigration Service will show that Tam Sen was examined through the medium of an interpreter, but this was the exaction of the Immigration Bureau, and had nothing to do with Tam Sen's ability to speak English. The testimony given before Judge Dooling was in the main given without the aid of an interpreter. In fact, an interpreter was only called when technical matters were inquired into. At the conclusion of the hearing Judge Dooling held in part as follows [Record, page 47]:

"OPINION.

"THE COURT [orally]: I am still of the opinion that it is not only the province, but the duty of the Court of a matter which is properly brought before it, to determine the validity of its own judgments, and to determine to what individuals and to what property they apply. That being so, I am thoroughly satisfied that the judgment rendered in favor of this particular individual, and the petition[er] will be discharged from custody.

"The legal question as to whether it is the province of the Court so to determine the matter is one of exceedingly great importance, and probably ought to be set at rest. I am not saying that the Court will undertake to determine the applica-

bility of the judgments of other courts, but where a judgment is entered in the court itself, it must not only be within the power of the Court, but it must be the duty of the Court to determine to what individuals and to what property which a judgment is applicable; otherwise, it would be valueless, if some outside person could say it does not apply to this man or to this property. For that reason I am of the opinion that [where] there the matter is properly brought before the Court, that it is not only the province or [of] the Court, but its duty, to determine to whom the judgment applies. . . . . "

SPECIAL NOTE

In comparing photographs from life with a tin type or photograph thereof, it must be borne in mind that the tin type is the reverse of a photograph taken from life, hence in comparing the photograph of Tam Sen taken from life with the original tin type picture or the photographs thereof, the left hand side of the photograph corresponds to the right hand side of the tin type or photograph thereof, and *vice versa.* In the folder in evidence where the enlargement of the photograph from life and the enlargement of the tin type are placed together, the sides which are in the center of the folder correspond and the two sides on the outer edges of the folder correspond.

ARGUMENT

There are four points involved in this case.

First—Whether the order allowing the appeal is sufficient, it not specifying the order from which the appeal was allowed.

Second—Whether a citizen of this country, of Chi-

nese extraction, returning from abroad, is not entitled, as a matter of right, to have his citizenship determined in the same way and under the same law by which all other citizens of this country have their citizenship determined.

Third—Whether or not there was an abuse of discretion upon the part of the Immigration officials in disregarding the evidence of citizenship presented by Tam Sen.

Fourth—Whether or not the Court below has jurisdiction in habeas corpus proceedings to determine the identity of the person to whom its own former court proceedings applied.

First—It is maintained that the order allowing the appeal in this case is insufficient to properly present before this Court the points which would otherwise be involved in the record. The point of this is that the order which allows **an appeal** does not designate the order or judgment from which the appeal is allowed. An examination of the record will show that in addition to the original order to show cause [T. R. 10] there was an order overruling the demurrer [T. R. 11 and 12] and the order of discharge [T. R. 49.]

Backus vs. *Yep Kim Yuen,* 227 Fed. 848.

Second—It is maintained that all citizens of this country without distinction, returning from abroad, are entitled to have their citizenship determined in exactly the same way. Rule 3 of the Regulations governing the admission of Chinese persons to the United States

provides that Chinese shall be examined first, as to the right of admission under the laws regulating immigration. *Ex parte Wong Tuey Hing,* 213 Fed. 112 [Page 114]. General Immigration Act of 1907, 34 Stat. 898, in sections 24 and 25 thereof, it is provided in part as follows:

> "Sec. 24. . . . . Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence. . . . . The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.
>
> "Sec. 25. That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards. . . . . "

In the present case instead of appointing a Board of Special Inquiry, the Commissioner of Immigration

proceeded to determine the citizenship of Tam Sen under the method and gauge provided by the Chinese Exclusion Laws, which provide for an entirely different procedure. Under the General Immigration Law, the Commissioner of Immigration is purely an executive officer, the *quasi* judicial function of determining the cases being vested in the immigration inspectors, first singly and then grouped in a Board of Special Inquiry. Under the Chinese Exclusion Laws the individual inspector examines and reports upon the case much as a referee would, and the Commissioner of Immigration then exercises the *quasi* judicial function of determining the case. In each instance a right of appeal exists from an adverse conclusion to the Secretary of the Department of Labor. The immigration procedure allows a complete inspection of the entire record, including the findings and reasonings of the Board of Special Inquiry. The procedure under the Chinese Exclusion Laws withholds this matter from the applicant for admission, only advising him of the final result. It is maintained that there cannot be two separate ways of determining American citizenship with due regard to the equal rights of all citizens before the law. In *U. S.* vs. *Sing Tuck,* 194 U. S. 161, it is held that:

> "Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the power of Congress to provide, at least, for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed

to enter the country without further trial."

The Sing Tuck decision is the forerunner of the Jew Toy case [198 U. S. 253] which in turn was followed by the Chin Yow case [208 U. S. 8]. In all of these cases it is noteworthy to observe that the point here urged is not discussed. In the Sing Tuck case, however, it is rather assumed that citizenship is determined by immigration inspectors.

The prejudicial effect of proceeding to determine this case under the Chinese Exclusion Laws springs from the fact that the Examining Inspector, who had this case from the beginning, was the one who completed the hearing and made his adverse recommendation, thus virtually disposing of the case, whereas, had the hearing been accorded under the General Immigration Laws this original examining inspector would have been incapacitated from acting on the Board of Special Inquiry, and the hearing would have been had before three immigration inspectors whose minds were not already made up against the applicant. *United States* vs. *Redfern,* 180 Fed. 500:

> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe that the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied the petitioner the right to land was illegal and without power."

Third—It is maintained that there was an abuse of

discretion in disregarding the evidence of citizenship presented by Tam Sen. In *Low Wah Suey* vs. *Backus,* 225 U. S. 460, it is held that:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

The Government in its brief relies upon the case of *ex parte Long Lock,* 173 Fed. 208, the opinion of which is written by Ray, District Judge. For the purpose of showing that the author of this opinion has agreed with us upon the law as it is applicable to a case such as is here presented, we cite an earlier case, the opinion of which was written by Ray, District Judge. In the case of *ex parte Kee Low,* 161 Fed. 592, District Judge Ray set forth the principles which would justify the Court in intervening, although in the Lee Kow case the facts did not so warrant. The extract follows:

> "The decision made was neither arbitrary nor unwarranted, and the evidence was not so conclusive as to warrant a court in saying that there has been an abuse of power or discretion. Unless the Court must say this or is forced to this conclusion by the record, it is its duty to dismiss the writ."

In the case of *ex parte Long Lock,* Judge Ray enunciates the principles of law involved in the concluding

portion of his decision, on page 215, as follows:

> "As decided in *Chin Yow* vs. *United States,* 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369, this court can only examine the evidence to see (1) was a full and fair and unbiased hearing had? and (2) was the decision based on such a state of facts that a question of fact was presented for the decision of the inspector? or (3) was the evidence conclusive, as matter of law, so that the decision, affirmed by the Department of Commerce and Labor, was arbitrary and unwarranted? I think the decision and order was fully warranted."

The case of *ex parte Long Lock, supra,* is chiefly valuable in the present case as it illustrates the facts of a case of a Chinese person applying to re-enter the United States, claiming that his status as an American citizen had been pre-determined before the Courts of the United States. The court held that the evidence presented was not so conclusive upon the point claimed as to warrant it to hold as a matter of law, that the decision of the executive authorities was arbitrary and unwarranted.

Upon behalf of the appellee in this case, our main reliance as a case illustrative of the facts of a person of Chinese descent applying to re-enter the United States, whose status as a citizen thereof had been judicially determined, is the case of *United States* vs. *Chin Len,* 187 Fed. 544, decided by the Circuit Court of Appeals for the Second Circuit. It is held on page 548, as follows:

> "This ruling denying the relator admission was not based on any convincing proof, but on conclusions drawn from slight and, in our opinion,

> wholly inconsequential discrepancies in the papers and mistakes in the testimony of the relator. In view of all the facts and circumstances shown by the record, we have no doubt that the relator is the identical person who was adjudged to be entitled to enter and to remain in the United States by United States Commissioner Paddock's judgment, and that he is the person who went to China in 1907 and returned to this country in 1909. To find otherwise would be arbitrarily to disregard the overwhelming weight of testimony."

It is recommended to the Court that it peruse the decision of the lower Court in the Chin Len case, which is reported as part of the decision of the Circuit Court of Appeals, though immediately preceding it. It covers pages 545-548. It is respectfully submitted upon this point that there was no real question of identity presented. That upon the facts as shown it was an arbitrary action to decide that the applicant for admission was other than Tam Sen who had been previously discharged in the habeas corpus proceeding mentioned.

It is a presumption of law that identity of person is indicated from identity of name. The strength of this presumption is augmented when both surnames and given names are identical. This is further augmented when the names are not of common occurrence, and where there are other methods of corroboration which further identify the person, such as the production of a document from proper custody, and similarity of handwriting.

Sperry vs. *Tebbs,* 10 Ohio Dec. 318;
16 Cyc. 1055;
Sewell vs. *Evans,* 4 Q. B. 626;

Bennett vs. *Libhart*, 27 Mich. 429;
Simpson vs. *Dismore*, Dowl. P. C. N. S. 357; 5 Jur. 1012; 9 M. & W. 314;
Myer vs. *Indiana Nat. Bk.* 27 Ind. App. 354, 61 N. E. 596;

In 2 Corpus Jur. 1102, it is held that, citing *U. S.* vs. *Ho Wai Liw*, 214 Fed. 456, *Jew Sing* vs. *United States*, 97 Fed. 582:

> "The production of the statutory certificate establishes *prima facie* the right to remain, and the burden then shifts to the Government which must produce some proof to overcome this *prima facie* evidence or it will be the commissioner's duty to discharge defendant. The proof should be clear and convincing, and until the government has made out such a case the holder of the certificate is not required to make further proof."

This Court has already had before it the value of pit or pock marks on the face as the method of exclusively establishing the identity of the person involved. In *Chin Ah Yoke* vs. *White*, 244 Fed. 940, at pages 941 and 942, this Court held:

> "Not only is there a general resemblance between the photographs, with such difference as might be produced by three years of fast living, but the peculiar significance of the photographs is in the fact that in each there are two pit or pock marks, plainly visible, found in the identical position on each face."

Fourth—It is maintained that the lower Court has always jurisdiction to determine to what persons or to what things its own records apply. The final judgment rendered in the habeas corpus case of Tam Sen, No. 6411 in the records and files in the lower Court,

expressly find that he is a citizen of the United States, and that he

> "is illegally restrained of his liberty as alleged in the petition herein, that he be and he is hereby discharged from the custody from which he has been produced, and that he go hence without day."

Jurisdiction to determine the issues involved in the case having properly been before the Court, and the Government having had its day in Court, and it having been then and there determined that Tam Sen was a citizen of the United States, certainly there must be some potency to that portion of the judgment which states **"that he go hence without day."** The Court that determined his citizenship is in a better position, by reason of the record before it, to determine to whom that record belongs, than any other tribunal. The original tin type photograph is a pertinent part of the record of the lower Court, and may not be removed therefrom. The important part that this played as a means of identification was shown upon the hearing of the judgment of the lower Court wherein all of the experts and the attorneys, and, indeed, also the Court, observed under the microscope the scars upon the original tin type photograph, and noted the scars in the same place upon the face of the petitioner then before the Court, and this after the elapse of twenty-nine years, which had passed between the taking of the tin type picture and the examination in court. This, probably, in the judgment of the Court, conclusively established the identity of the detained, as being the person of whom the original tin type picture had been taken.

The record discloses that the original record 6411 was introduced in evidence in this case before the lower Court in the trial of this issue [P. 46 and 47] and the same was marked "Petitioner's Exhibit C." It is incumbent upon the appellant to produce a complete record before the Court, yet as attention was directed upon the hearing herein that this "Exhibit C" had been omitted by appellant, it is assumed that appellant will take the proper steps to present the same before this Court.

In finally submitting this case for the consideration of the Court, I feel impelled in doing so to cite the language of the Assistant District Attorney, Mr. Ornbaum as contained on page 33 of the record as follows:

> "MR. ORNBAUM: If your Honor please, under these circumstances, I do not think that the Government would be justified in going any further into this case. I take the position where such a valuable right of any person is at stake, and there is such a strong resemblance as in this case, I don't believe that, under the circumstances, the Government is really justified in pressing the case any further."

Respectfully submitted,

GEORGE A. MCGOWAN,

Attorney for Appellee.